No. 82-1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Appellants,

v.

HENRY T. McMILLAN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether an at-large election system required by a state constitution violates the fourteenth amendment to the United States Constitution where there is no evidence that the election system was established or is being maintained for a discriminatory purpose.

2. Whether, following a decision invalidating an at-large election system required by a state constitution, a court may impose a judicially created remedy rather than consider as a "legislative plan" a remedy a legislative body adopts where the state constitution and statutes provide the legislative body with expansive powers and do not prohibit it from adopting a remedy for the violations found.

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Appellants Escambia County, Florida ("Escambia") and the members of the Escambia Board of County Commissioners ("County Commission"),[1] through counsel, submit

[1]The current members of the County Commission are: John E. Frenkel, Jr.; Billy G. Tennant; Kenneth J. Kelson; Gerald Woolard; and Marvin Beck. Appellants Woolard, Frenkel and Tennant were substituted for Charles Deese, Jack Kenney and Zearl Lancaster respectively, who were members of the County Commission at the time the suit was brought. The remaining parties to this action are: the Supervisor of Elections for Escambia, Joe Oldmixon, who is a defendant but is not a party to this appeal; Henry T. McMillan, appellee; Robert Crane, appellee; Charles L. Scott, appellee; William F. Maxwell, appellee; Clifford Stokes, appellee; and the class of all black citizens of Escambia, appellees. This suit also was brought against the School District of Escambia, the Escambia School Board and the members thereof. The School Board aspect of the case was resolved, McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981), and was not part of the judgment from which this appeal was taken.

this brief and request the Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit from which this appeal was taken.

OPINIONS BELOW

The September 24, 1982 and February 19, 1981 decisions of the Fifth Circuit in *McMillan v. Escambia County, Florida* are reported at 688 F.2d 960; 638 F.2d 1249; and 638 F.2d 1239 and are reprinted in the Jurisdictional Statement[2] in Appendix A at 1a and Appendix B at 52a and 30a respectively. The December 3, 1979 Memorandum Decision and Order, the September 24, 1979 Memorandum Decision and the July 10, 1978 Memorandum Decision and Judgment of the United States District Court for the Northern District of Florida are unreported but are reprinted in the Jurisdictional Statement in Appendix B at 54a, 59a, 66a, 71a and 114a respectively.

JURISDICTION

Pursuant to 28 U.S.C. § 1254(2) (1976), this Court has jurisdiction over the instant appeal.

The Fifth Circuit entered judgment on September 24, 1982, and on November 4, 1982, denied appellants' suggestion of rehearing en banc. (The Judgment and the order denying the suggestion of rehearing are reprinted in the Jurisdictional Statement in Appendix C at 116a and 118a respectively.) On November 30, 1982, appellants filed with the Fifth Circuit a Notice of Appeal to the Supreme Court of the United States. (The notice of appeal is reprinted in

[2]Citations to materials which appear in: the Jurisdictional Statement are to "J.S.;" the Joint Appendix are to "J.A.;" and the Record are to "R."

the Jurisdictional Statement in Appendix D at 120a.) The Jurisdictional Statement was filed, and the appeal was docketed, on February 2, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions of U.S. Const. amend. XIV; Fla. Const. art. VIII, § 1; Fla. Stat. § 125.001-.59 (1981 & Supp. 1982) which are involved in this case are reprinted in the Jurisdictional Statement in Appendix E at 122a, 123a and 126a respectively.

STATEMENT OF THE CASE[3]

I. Escambia County, Florida.

Escambia is a non-charter county[4] comprising approximately 661 square miles[5]. According to the 1970 census, the population of Escambia was 205,334, of whom 40,362, or 19.7%, were black.[6]

Pursuant to Fla. Const. art. VIII, § 1(e), non-charter counties, such as Escambia, are governed by five-member boards of county commissioners. The Florida Constitution and statutes secure Florida's non-charter counties

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[3]Except as otherwise noted, the facts set forth herein are those facts in existence at the time of the trial – May, 1978.

[4]Pretrial stipulation ¶ F(3). (J.A. 69.)

[5]Bureau of the Census, U.S. Dept. of Commerce, PC80-1-A11, 1980 Census of Population – Florida 8 (1982).

[6]Pretrial Stipulation ¶ F(1). (J.A. 68.) The current population of Escambia is approximately 233,794, of whom 45,945, or 19.7%, are black. Bureau of the Census, U.S. Dept. of Commerce, PC80-1-B11, 1980 Census of Population – Florida 15,25 (1982).

broad home rule powers.[7] Under these powers, county commissions have "such power of self-government as is provided by general or special law" and "may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law . . . ."[8] Florida law enumerates specific powers of county commissions but expressly provides that the power of county commissions to carry on self-government is not restricted to the enumerated powers.[9]

County commissioners are elected to four-year, staggered terms.[10] Candidates in the primary and general elections are elected at-large but run only from the district in which each resides.[11] To become a candidate, Fla. Stat. § 99.092(1) (1981) provides for the payment by each person desiring to run of a filing fee equivalent to three (3) percent of the annual salary of a county commissioner and, if

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[7]Fla. Const. art. VIII, § 1(f); Fla. Stat. § 125.01(3) (b) (1981).

[8]Fla. Const. art VIII, § 1(f).

[9]Fla. Stat. § 125.01(1)(1981).

[10]Fla. Const. art. VIII, § 1(e).

[11]*Id.;* Fla. Stat. § 99.032 (1981). The at-large system for general elections was instituted in 1901. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 4-5 (N.D. Fla. July 10, 1978) (Memorandum Decision). (J.S. 74.) Previously, between 1868 and 1901, the governor had appointed county commissioners. *Id.* at 4. (J.S. 74a.) By 1900, blacks had been disenfranchised, and in 1901, an amendment to the Florida Constitution establishing at-large elections was ratified. *Id.* at 4-5. (J.S. 74a-75a.)

The at-large system for primary elections was not established until 1954. *Id.* at 5-6. (J.S. 75a-76a.) In 1907, a statute was enacted which provided for candidates in the primaries to be elected from single-member districts. 1907 Fla. Laws ch. 5697, § 1. In 1954, the Florida Supreme Court struck down this statute as violative of Florida's constitutional requirement of at-large elections. Ervin v. Richardson, 70 So.2d 585 (Fla. 1954). Due to that decision, subsequent primaries have been conducted under the at-large system.

levied by the executive committee of the person's political party, a committee assessment of up to two (2) percent of a county commissioner's salary. If a person is unable to afford the filing fee and committee assessment without undue burden on his or her financial resources, he or she may gain ballot access through a petition signed by three (3) percent of the registered voters in the county from that person's party.[12] There is no majority vote requirement in the general election, but there is such a requirement in the primary elections.[13]

Since 1945, when the Florida Supreme Court held unconstitutional the white primary,[14] there have been "no racially designated legal restrictions on the ability of black citizens of Escambia County to register, vote or campaign for the County Commission . . . ."[15] There also are no formal slating organizations.[16] The percentage of eligible blacks who have registered is roughly the same as the percentage of eligible whites, i.e., 66.9% of eligible blacks and 69.7% of eligible whites.[17] Blacks constitute approximately 17% of the registered voters in Escambia.[18]

In addition, blacks in Escambia are active in the Democratic Party. Of the nine officers of the Democratic

[12]Fla. Stat. §§ 99.095(1) (1981). A person who runs as an independent candidate may gain ballot access by a petition signed by three (3) percent of the registered voters in the county. *Id.* § 99.0955 (1981).

[13]Fla. Const. art. VI, § 1; Fla. Stat. §§ 100.061, 100.091 (1981).

[14]Davis v. State *ex rel.* Cromwell, 156 Fla. 181, 23 So.2d 85 (1945).

[15]Pretrial Stipulation ¶ F (17). (J.A. 74.)

[16]*Id.* ¶ F (18). (J.A. 74.) There have been informal " 'endorsing' groups" which have endorsed both black and white candidates. *Id.*

[17]*Id.* ¶ F (1). (J.A. 68.)

[18]McMillan v. Escambia County, Fla. PCA No. 77-0432, typescript op. at 10 (N.D. Fla. July 10, 1978) (Memorandum Decision). (J.S. 80a.)

Executive Committee of Escambia, four officers – Dorothy Devault, John Reed, Cleveland Williams and William Marshall – are black; and approximately twenty (20) percent of that Committee's members are black.[19] The Democratic Party promotes equally black and white Democratic candidates who run for office in Escambia.[20] No black has run for the County Commission since 1970.[21] Between 1966 and 1970 three blacks ran for County Commission, but none was elected.[22] No other black has run for the County Commission.[23]

II. Proceedings Below.

On March 18, 1977, the named appellees filed this class action on behalf of themselves and all black citizens in Escambia against Escambia, the members of the County Commission and the Supervisor of Elections alleging that the at-large system, as designed and/or maintained, denies appellees equal access to the political process leading to nomination and election to the County Commission in violation of the first, thirteenth, fourteenth, and fifteenth amendments to the United States Constitution, section 2

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[19]Transcript at 1765-66 (testimony of A.J. Boland, Chairperson of the Escambia Democratic Executive Committee). (J.A. 550-51.) Mr. Marshall also is the Secretary-Treasurer of the Democratic Executive Committee of Florida. *Id.* at 1765 (J.A. 550); *Id.*, under separate cover, at 17 (testimony of William Marshall). Mr. Marshall testified that approximately forty (40) percent of the members of the Escambia Democratic Executive Committee are black. *Id.* at 33-34. (J.A. 384-85.)

[20]*Id.* at 20.

[21]Pretrial Stipulation ¶ F (20). (J.A. 74-75.)

[22]*Id.* One candidate, John Reed, ran twice – once in 1966 and once in 1970. *Id.*

[23]*Id.*

of the Voting Rights Act of 1965[24] and 42 U.S.C. § 1983 (1976).[25] As relief, appellees sought a declaratory judgment that the at-large election system violates the aforementioned constitutional and statutory provisions, an order enjoining appellants from holding elections under the at-large system, an order imposing a single-member district election system and an award of attorneys' fees and other costs.[26] Between May 15, 1978, and May 25, 1978, a non-jury trial was held before the Honorable Winston E. Arnow, and on July 10, 1978, the court entered a Memorandum Decision[27] and a Judgment[28] in favor of appellees.

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[24]42 U.S.C. § 1973 (1976).

[25]Compl. ¶¶ II, IV, V(H). (J.A. 46, 47, 49-50.) Appellees sued the County Commissioners and the Supervisor of Elections in their individual and official capacities.

[26]*Id. ad damnum* clause. (J.A. 50-51.)

[27]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D.Fla. July 10, 1978). (J.S. 71a.)

[28]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. July 10, 1978). (J.S. 114a.) (Unless otherwise noted, further citations to the court's actions on July 10, 1978, are to the Memorandum Decision and not to the Judgment.)

Trial of this suit was consolidated with trial of Jenkins v. City of Pensacola, Fla., PCA No. 77-0433 (N.D.Fla. July 10, 1978), which was filed on the same day as *McMillan*. Plaintiffs in *Jenkins* made virtually the same allegations with respect to elections for the Pensacola City Council as appellees herein made with respect to elections for the County Commission and Escambia School Board. The court's July 10, 1978 decision held for plaintiffs in both the *McMillan* and *Jenkins* suits. The *Jenkins* suit has been resolved, Jenkins v. City of Pensacola, Fla., 638 F.2d 1249 (5th Cir. 1981), *appeal* and *petition for cert. dismissed per stipulation*, 453 U.S. 946 (1981); McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981), *appeal* and *petition for cert. dismissed per stipulation sub nom.* City of Pensacola, Fla. v. Jenkins, 453 U.S. 946 (1981) (J.S. 1a), and is not part of this appeal.

In reaching its decision, the court based its analysis initially on the criteria set forth by the Fifth Circuit in *Zimmer v. McKeithen*[29] for determining the existence of vote dilution (the "*Zimmer* factors").[30] With respect to the primary *Zimmer* factors, the court found that there are no slating organizations which prevent blacks from participating in the election system, that "[a]ctive efforts are made to encourage" eligible blacks and whites alike to register and to vote, that "there is no significant difference between blacks and whites in that respect" and that white candidates desire and "actively seek" the support of blacks.[31] However, the court determined that blacks are denied access to the political process because it found that there is a pattern of bloc voting, that the provision for the payment of the filing fee and committee assessment frustrates blacks and that, when they have run, blacks have lost.[32] The court also found that "[p]ast discrimination has helped create bloc voting."[33] As to the remaining, primary *Zimmer* factors, the court found the County

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[29]485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[30]The *Zimmer* factors are divided into two categories – "primary factors" and "enhancing factors." The primary factors are: lack of minority access to the candidate selection process; unresponsiveness of the elected officials to the interests of the minority; a tenuous state policy favoring at-large elections; and the existence of past discrimination which precludes the minority from participating in the election system. *Id.* at 1305. The enhancing factors are: the existence of large districts; the presence of a majority vote requirement; the existence of an anti-single shot voting provision; and the absence of a provision for candidates to run from geographical subdistricts. *Id.*

[31]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 10, 15, 20 (N.D.Fla. July 10, 1978). (J.A. 79a-80a, 84a, 90a.)

[32]*Id.* at 10-12. (J.S. 79a-82a.)

[33]*Id.* at 17. (J.S. 86a-87a.)

Commissioners generally to be responsive to the needs of blacks[34] and the policy underlying the preference for the at-large system to be tenuous[35].

With respect to the enhancing *Zimmer* factors, the court acknowleged the existence of the residency requirement, the majority vote requirement in the general election and the absence of an anti-single shot voting provision.[36] However, the court found that no one in recent history had won a general election without a majority and that, even though there is no anti-single shot voting provision, candidates run for numbered places, which renders blacks unable to concentrate their votes in a large field of candidates.[37] The court also determined that Escambia is "geographically large."[38] Taken in the aggregate, the court found that the *Zimmer* factors showed a dilution of black voting strength.[39]

Next, the court examined the issue of intent and resolved that "no discriminatory intent can be found as a motivating factor behind the 1901 amendment" to the Florida Constitution requiring at-large elections.[40]

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[34]*Id.* at 15, 19. (J.S. 84a-85a, 88a.) Appellees stipulated to appellants' responsiveness in the following areas: water; sewers; traffic control; fire hydrants; mosquito control; library services; ambulance service; garbage collection and disposal; drainage planning; housing; and corrections. Pretrial Stipulation ¶ F(22). (J.A. 76a.)

[35]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 16-17 (N.D. Fla. July 10, 1978). (J.S. 86a.) This finding was based on the identical considerations as, and was subsumed in, the court's finding on intent, which is discussed at 9-10 *infra*. *Id.*

[36]*Id.* at 18. (J.S. 87a-88a.) The Court noted that there is a majority vote requirement in the primaries. *Id.*

[37]*Id.*

[38]*Id.*

[39]*Id.* at 19. (J.S. 89a.)

[40]*Id.* at 25. (J.S. 93a.)

However, the court reached a different result as to the current maintenance of the at-large system. The court based this finding primarily on the County Commissioners' responses to the recommendations of two charter committees, appointed by the County Commission in 1975 and 1977, that county commissioners should be elected from single-member districts.[41] The court observed that the County Commissioners testified at trial that they did not include either recommendation in a 1977 charter referendum because they believed that commissioners elected at-large would be more responsive to the needs of Escambia as a whole than would commissioners elected from single-member districts.[42] In addition, the court noted that, in their post-trial memorandum, appellants "admit[ted]" that the rejection of the single-member district proposals reflected the Commissioners' desire to retain their incumbency.[43] Based on this evidence, the court determined that the County Commissioners were responsible for retaining the at-large system and, "bolstered by the findings under the *Zimmer* factors," drew the "inference" that the Commissioners' actions were motivated in part by the possibility that, in future elections under a single-member district system, one or more of them might be replaced by blacks.[44]

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[41]The committee appointed in 1975 proposed a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large. Charter Government Study Committee Report at 3 (Plaintiffs' Exhibit 98). (J.A. 1165.) The committee appointed in 1977 proposed a five-member county commission with all members to be elected from single-member districts. Charter Government Study Committee Report at 3 (Plaintiffs' Exhibit 100). (J.A. 1233.)

[42]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 29 (N.D. Fla. July 10, 1978). (J.S. 96a-97a.)

[43]*Id.* at 30. (J.S. 98a.)

[44]*Id.* at 31. (J.S. 98a.)

In sum, the court concluded that "the preponderance – though not an overwhelming preponderance – of the evidence"[45] showed that the at-large system for elections to the County Commission "effectively dilutes the votes of black citizens" and "is being maintained at least in part for discriminatory reasons"[46]. As a result, the court held that the system violates the fourteenth and fifteenth amendments to the Constitution as well as section 2 of the Voting Rights Act of 1965.[47] As relief, the court directed the parties to submit proposals to remedy the dilution which the court found to exist.[48]

On August 9, 1978, appellants filed a Notice of Appeal of the court's July 10, 1978 decision. Thereafter, the County Commission adopted and submitted to the court as a remedy an ordinance reapportioning the county commissioners' districts to provide a district with a black population and registered voter majority and establishing an election system to provide a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large.[49] Appellees proposed a remedy which reapportioned the county commissioners' districts differently from appellants' plan, but also provided for a district in which blacks comprised a majority of the population, and pro-

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[45] *Id.* at 35. (J.S. 103a.)

[46] *Id.* at 32. (J.S. 99a-100a.)

[47] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 32, 34 (N.D.Fla. July 10, 1978). (J.S. 100a, 101a.)

[48] *Id.* at 38 (J.S. 105a); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D.Fla. July 10, 1978) (Judgment). (J.S. 114a.)

[49] Notice of Adoption of Ordinance Amending Election Plan exh. (R. 1250.)

vided for a five-member county commission with all commissioners to be elected from single-member districts.[50]

During this time, the people of Escambia again were considering a change to a charter form of government. As a result, the court postponed consideration of the remedy until the proposed form of charter government became known.[51] The charter commission proposed, inter alia, a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large;[52] and a referendum election on the charter was scheduled for November 6, 1979.

On September 24, 1979, the court issued a Memorandum Decision giving tentative approval to the election system contained in the charter proposal.[53] In its opinion, the court compared appellants' proposed remedy with the charter proposal and observed that the two plans were "strikingly similar."[54] However, based on its interpretation of *Wise v. Lipscomb*,[55] the court disapproved ap-

[50]Plaintiffs' Submission of Districting Plan for the County Commission and School Board at 1. (R. 1209.)

[51]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D.Fla. Sept. 24, 1979) (Memorandum Decision). (J.S. 66a.)

[52] Notice of Proposed County Charter app. § 301. (J.A. 91.)

[53]McMillan v. Escambia County, Fla. PCA No. 77-0432 (N.D. Fla. Sept. 24, 1979). (J.S. 66a.)

[54]*Id.* at 2. (J.S. 67a.)

[55]437 U.S. 535 (1978). The issue in *Wise* was whether a proposed remedy providing for an election system with a mixture of single-member and at-large districts, which the Dallas City Council had adopted in response to a declaratory judgment that the existing at-large system was unconstitutional, was a judicially imposed or a legislatively enacted remedy. This determination was necessary because the Court previously had indicated that, when a court holds unconstitutional an existing election system, it is held to a higher stan-

pellants' proposal.[56] The court reasoned that the Florida Constitution prohibits any system of electing county commissioners other than the at-large system which the court already had held unconstitutional and that the Florida Constitution limits the powers of the County Commission to those the Florida Legislature provides by general or special law.[57] Therefore, the court also held that, under *Wise*, the County Commission lacked the power to adopt a "legislative plan," and that, in the event the charter proposal were rejected, the remedy the court would impose would be treated as judicially created and only would provide for single-member districts.[58]

On November 6, 1979, the referendum was held, and the voters rejected the charter proposal.[59] On December 3,

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dard in fashioning a remedy than is a legislature. *Id.* at 540-41 (White, J.). That higher standard requires a court, absent special circumstances, to devise an election system comprised exclusively of single-member districts. *Id.* In *Wise*, the Court upheld the election system the Dallas City Council adopted because a majority of the Court agreed that it was a "legislative plan."

[56]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D. Fla. Sept. 24, 1979). (J.S. 68a.) In addition, the court indicated its disapproval of appellants' proposed remedy because it would not have resulted in blacks' being represented in proportion to their percentage of the population but, rather, would have assured them of only 14.3% of the seats on the county commission. *Id.* at 4-5. (J.S. 69a-70a.) Even though the charter proposal also would have resulted in the same proportion of representation for blacks, the court gave tentative approval to that proposal because appellees did not object to it. *Id.* at 5. (J.S. 70a.)

[57]*Id.* at 3. (J.S. 68a.)

[58]*Id.*

[59]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Dec. 3, 1979) (Memorandum Decision). (J.S. 54a.)

1979, the Court issued a Memorandum Decision[60] and an Order,[61] imposing its election system and reapportionment plan. The election system provided for a five-member county commission with all of the members to be elected from single-member districts.[62] The boundaries for the county commissioners' districts were the same boundaries the court had adopted for the Escambia school board districts.[63] The court's Order also provided that, following each decennial census, the county commission was to reapportion the county commissioners' districts to comply with the one-person, one-vote requirement and the orders of the court.[64] Finally, pursuant to section 3 of the Voting Rights Act of 1965,[65] the court retained jurisdiction over the suit for a period of five years.[66]

On January 3, 1980, appellants filed a Notice of Appeal of the court's December 3, 1979 decision, and on January 23, 1980, moved the district court for a stay pending ap-

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[60]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Dec. 3, 1979). (J.S. 54a.)

[61]McMillan v. Escambia County Fla., PCA No. 77-0432 (N.D.Fla. Dec. 3, 1979). (J.S. 59a.)

[62]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1-2 (N.D. Fla. Dec. 3, 1979) (Memorandum Decision) (J.S. 54a-55a); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Dec. 3, 1979) (Order) (J.S. 59a).

[63]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1-2 (N.D. Fla. Dec. 3, 1979) (Memorandum Decision) (J.S. 55a); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Dec. 3, 1979) (Order) (J.S. 59a).

[64]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 2 (N.D. Fla. Dec. 3, 1979). (J.S. 60a.)

[65]42 U.S.C. § 1973a (1976).

[66]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D.Fla. Dec. 3, 1979). (J.S. 61a.)

peal of elections under the December 3, 1979 Order. On February 15, 1980, the court denied the motion,[67] and on February 22, 1980, appellants filed a Notice of Appeal of the denial. Also on February 22, 1980, appellants moved the Fifth Circuit for a stay pending appeal of the district court's December 3 Order. On March 10, 1980, the Fifth Circuit stayed that Order.[68]

On February 19, 1981, the Fifth Circuit rendered its decision in *McMillan v. Escambia County, Florida* (*"McMillan I"*)[69] reversing that part of the district court's July 10, 1978 decision concerning the at-large system of electing Escambia's county commissioners. In so doing, the court first held that the district court had applied the correct legal standard applicable to vote dilution cases because the court had recognized that proof of discriminatory intent is a requirement in such cases and had made specific findings concerning intent separate from, and in addition to, its *Zimmer* findings.[70] With respect to the district court's findings, the Fifth Circuit agreed that racial considerations were not a factor behind the enactment of the 1901 amendment to the Florida Constitution requiring at-large elections.[71] However, the court

[67]McMillan v. Escambia County, PCA No. 77-0432 (N.D.Fla. Feb. 15, 1980) (Order). (J.A. 1261.)

[68]McMillan v. Escambia County, Fla., No. 78-3507 (5th Cir. Mar. 10, 1980) (Order). That Order also consolidated for oral argument and disposition appellants' earlier appeal of the district court's July 10, 1978 Judgment, as well as the appeals of the district court's July 10, 1978 Judgments with respect to the Escambia School Board and the Pensacola City Council.

[69]638 F.2d 1239 (5th Cir. 1981). (J.S. 30a.) The Fifth Circuit affirmed those parts of the district court's decision concerning the election systems for the Escambia School Board and the Pensacola City Council. *Id.*

[70]*Id.* at 1243. (J.S. 39a.)

[71]*Id.* at 1244. (J.S. 40a-41a.)

disagreed that appellants were maintaining the at-large system for discriminatory purposes.

The court reviewed the record and "found no evidence of racial motivation by the county commissioners in retaining the at-large system."[72] As to the expression by the Commissioners of the desire to retain their incumbency, the court reasoned that "the desire to retain one's incumbency unaccompanied by other evidence ought not to be equated with an intent to discriminate against blacks *qua* blacks."[73] The court observed that the Commissioners testified that "'good government'" reasons, not race, motivated them to delete from the charter referendum proposals for single-member districts and that appellees introduced no evidence to the contrary.[74] The court admonished that "[t]he trial judge, of course, was entitled not to believe the commissioners' testimony; in the absence of contradictory evidence, however, disbelief of that testimony is not sufficient to support a contrary finding."[75] Because there was no contradictory evidence, the Fifth Circuit held that "the evidence falls short 'of showing that the appellants 'conceived or operated [a] purposeful [device] to further racial discrimination.' ' "[76] Accordingly, the court reversed the portion of the district court's opinion invalidating the at-large system of electing

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[72] *Id.* at 1245. (J.S. 42a.)

[73] *Id.* (J.S. 42a-43a.)

[74] *Id.* at 1244-45. (J.S. 41a-43a.)

[75] *Id.* at 1245. (J.S. 43a.)

[76] *Id.* at 1245 (quoting City of Mobile, Ala. v. Bolden, 446 U.S. 55, 66 (1980) (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971))). (J.S. 43a.)

Escambia's county commissioners.[77] In a separate decision, *McMillan v. Escambia County, Florida ("McMillan II"),*[78] the court, based on its decision in *McMillan I,* vacated the December 3, 1979 remedy the district court had ordered.

Thereafter, on April 1, 1981, appellees filed a Petition for Rehearing and a Suggestion of Rehearing En Banc. While the Petition and Suggestion were pending, the 1980 census was published; and on December 22, 1981, the County Commission, pursuant to Fla. Const. art. VIII, § 1(e); Fla. Stat. § 124.01 (1981), reapportioned the county commissioners' districts.[79] Also while the Petition and Suggestion were pending, this Court received briefs, and heard argument, in *Rogers v. Lodge*[80]. The Fifth Circuit stayed consideration of appellees' Petition and Suggestion pending the decision in *Rogers* and, following that decision, requested the parties to submit briefs on the ef-

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[77]The Fifth Circuit's analysis and decision was based entirely on the fourteenth amendment. The court rejected appellees' claims under the fifteenth amendment and section 2 of the Voting Rights Act of 1965. The court reasoned that, in City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980), a plurality of this Court had held that section 2 "has an effect no different from that of the Fifteenth Amendment," 446 U.S. at 61, and that, even assuming section 2 allowed a private right of action, appellees could not succeed under that section unless they also could succeed under the fifteenth amendment. 638 F.2d at 1242 n.8. (J.S. 37a.) The court adopted the *Bolden* plurality's view that the fifteenth amendment does not apply to vote dilution claims. *Id.* at 1243 n. 9. (J.S. 38a.)

[78]638 F.2d 1249 (5th Cir. 1981). (J.S. 52a.)

[79]Minutes of December 22, 1981 County Commission Meeting at 5-6. Article VIII, § 1(e) of the Florida Constitution and section 124.01 of the Florida statutes require the county commissioners' districts to be apportioned according to the one person, one vote principle.

[80]457 U.S. ____, 102 S.Ct. 3272 (1982).

fect of *Rogers*. Without other briefing and without oral argument, on September 24, 1982, the court granted appellees' Petition for Rehearing and, based on *Rogers*, vacated the portion of its decision in *McMillan I* concerning elections to the County Commission and its decision in *McMillan II* and substituted therefor its decision in *McMillan v. Escambia County, Florida ("McMillan III")*.[81]

The court first examined the impact of *Rogers* and observed that, in *Rogers*, the Court reaffirmed the holding of a majority in *City of Mobile, Alabama v. Bolden*[82] that evidence of discriminatory purpose is necessary to sustain a challenge to an election system under the equal protection clause of the fourteenth amendment.[83] The court also determined that *Rogers* gave more significance to the *Zimmer* factors and greater deference to the findings of a district court than did the *Bolden* plurality.[84] In view of these determinations and the determination that, consistent with *Rogers*, the district court had not limited its inquiry to the *Zimmer* factors, the court held that the district court had applied the proper legal standard applicable to vote dilution cases.[85]

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[81]688 F.2d 960 (5th Cir. 1982). (J.S. 1a.) On October 22, 1982, the court denied appellees' suggestion of en banc consideration. McMillan v. Escambia County, Fla., Nos. 78-3507, 80-5011 (5th Cir. Oct. 22, 1982).

[82]446 U.S. 55 (1980).

[83]*McMillan III*, 688 F.2d at 964. (J.S. 10a-11a.)

[84]*Id.* at 964-965. (J.S. 11a-12a.)

[85]*Id.* at 965. (J.S. 12a-13a.) The court indicated that the district court had gone beyond the *Zimmer* factors by looking into, and drawing an inference from, the County Commission's responses to the single-member district proposals. *Id.* (J.S. 13a.)

The court then reiterated the district court's findings and concluded that, under *Rogers*, it could not "say the district court's finding of intent was clearly erroneous."[86] Therefore, the court upheld the district court's July 10, 1978 decision invalidating Florida's constitutional provision for elections to the County Commission. As a result, the court next addressed the remedy the district court had imposed. The court agreed with the district court's analysis of the remedy issue, held that the remedy the district court had ordered was within that court's discretion, and, accordingly, affirmed the December 3, 1979 Order.[87]

Due to the passage of time between the December 3, 1979 Order and the decision in *McMillan III*, the Fifth Circuit remanded the case to the district court with instructions to revise the scheduling terms of the remedial

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[86] *Id.* at 965-69. (J.S. 13a-22a.) The court did not address appellees' arguments based on amended section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (West Supp. 1983), because it had not afforded appellants the opportunity to respond to those arguments. *McMillan III*, 688 F.2d at 961 n. 2. (J.S. 3a.) The court also did not address appellees' fifteenth amendment claims. *Id.* However, the court concluded that *Rogers*, which did not address either the fifteenth amendment or amended section 2, provided "no basis for departing from the *Bolden* plurality's analysis." *Id.*

[87] *Id.* at 969-73. (J.S. 22a-29a.) Specifically, the court agreed with the distinction the district court drew between this case and *Wise*. The court reached this result by adopting the analysis of Justice White, joined in by Justice Stewart, rather than the analysis of Justice Powell, joined in by Chief Justice Burger and Justices Blackmun and Rehnquist, because, in the court's view, the analysis of Justice White controlled the outcome of the suit. *Id.* at 972. (J.S. 28a.) Based on this analysis, the court determined that the Florida Constitution limits the power of the County Commission to the powers specifically authorized by state law which powers do not include the power to adopt a remedial election system. *Id.* (J.S. 29a.) Accordingly, the court concluded that the County Commission lacked the power to adopt such a system. *Id.*

Order.[88] On April 18, 1983, this Court noted probable jurisdiction over appellants' appeal of the Fifth Circuit's decision in *McMillan III*.[89]

SUMMARY OF ARGUMENT

The Fifth Circuit misinterpreted this Court's decision in *Rogers*. The legal standard applicable to constitutional vote dilution cases this Court articulated in *Rogers* is the same standard the plurality enunciated in *Bolden* and the Fifth Circuit applied in *McMillan I*. The opinion in *Rogers* also does not accord greater deference to district court findings than the plurality opinion in *Bolden*. The Fifth Circuit, therefore, should not have granted rehearing.

Further, the Fifth Circuit erred in its application of the clearly erroneous standard of Fed. R. Civ. P. 52(a) to the

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[88] *Id.* at 973. (J.S. 29a.) The Fifth Circuit denied appellants' suggestion of rehearing en banc, McMillan v. Escambia County, Fla., Nos. 78-3507, 80-5011, (5th Cir. Nov. 4, 1982) (J.S. 118a.), and appellants' motion for a stay of mandate. McMillan v. Escambia County, Fla., Nos. 78-3507, 80-5011 (5th Cir. Nov. 23, 1982); and Justice Powell denied appellants' application for stay of judgment, McMillan v. Escambia County, Fla., No. A-494 (U.S. Dec. 2, 1982).

As discussed more fully at 48 n. 172 *supra*, on remand, the district court issued a remedial Order, McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D.Fla. Mar. 11, 1983), *appeal docketed*, No. 83-3275 (11th Cir. Apr. 27, 1983), *petition for cert. before judgment filed*, 52 U.S.L.W. 3005 (U.S. July 1, 1983) (No. 82-2155), implementing its interpretation of the Fifth Circuit's mandate. Thereafter, appellants sought a stay of the Fifth Circuit's judgment and the Order the district court issued pursuant to that judgment. On May 26, 1983, Justice Powell again denied appellants' application for stay. Escambia County, Fla. v. McMillan, No. A-939 (No. 82-1295) (U.S. May 26, 1983).

[89] Escambia County, Fla. v. McMillan, ___U.S. ___, 103 S.Ct. 1766 (1983).

district court's findings. A review of the record confirms the Fifth Circuit's conclusion in *McMillan I* that there was no evidence that appellants established or maintained the at-large system of electing Escambia's county commissioners for a discriminatory purpose. Nevertheless, in *McMillan III,* the Fifth Circuit upheld the court's finding of discriminatory intent because of its mistaken conclusion that, after *Rogers*, the clearly erroneous standard precludes a reviewing court from disturbing a district court's findings.

Because there was no evidence that appellants established or maintained the at-large election system for a discriminatory purpose, the decisions of the Fifth Circuit and the district court stand as a threat to all at-large election systems. This Court repeatedly has refused to hold at-large election systems unconstitutional per se. Unless the Court now is willing to hold otherwise, the Fifth Circuit's decision must be reversed.

Moreover, neither the Fifth Circuit nor the district court heeded this Court's frequently reiterated admonition that devising election systems and reapportionment plans are legislative, not judicial, functions. Both courts below therefore, refused to consider as a "legislative plan" the remedial election system and reapportionment plan the County Commission adopted. This was due to both courts' erroneous decisions not to adopt Justice Powell's analysis in *Wise v. Lipscomb.*

Even under the analysis the courts did adopt, Justice White's analysis in *Wise,* the courts still erred in refusing to consider as a "legislative plan" the County Commission's proposed remedy. Under Florida law, non-charter county commissions have expansive powers. Nevertheless, in direct contravention of a decision by the

Florida Supreme Court, the courts below held that the powers of non-charter county commissions are circumscribed narrowly. The district court, therefore, ordered, and the Fifth Circuit upheld, the unwarranted preemption of a legislative task and the imposition of a judicially created election system and reapportionment plan.

ARGUMENT

I. The Fifth Circuit Erred in Upholding the District Court's Decision that the At-Large System of Electing Escambia's County Commissioners Violates the Fourteenth Amendment Because There Was No Evidence that the System Was Established or Maintained for a Discriminatory Purpose.

This Court's decision in *Rogers* again confirms that an at-large election system is not unconstitutional per se[90] and may not be held to violate the Constitution unless there is a finding that the system was established or is maintained for a discriminatory purpose[91]. In *McMillan III*, the Fifth Circuit recognized this to have been the import of *Rogers*.[92] However, the court went on to interpret *Rogers* incorrectly as "reflect[ing] both a more favorable view of the *Zimmer* factors and a greater deference to the finding of a district court than the analysis of the *Bolden* plurality."[93] A comparison of the Court's opinion in

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[90] 457 U.S. at ____, 102 S.Ct. at 3275-76; *accord Bolden*, 446 U.S. at 66, 102-03 (opinions of plurality, White, J.); White v. Regester, 412 U.S. 755, 765 (1973); Whitcomb v. Chavis, 403 U.S. 124, 142 (1971).

[91] 457 U.S. at ____, 102 S.Ct. at 3275-76; *accord Bolden*, 446 U.S. at 66, 102-03 (opinions of plurality, White, J.); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971); *see* White v. Regester, 412 U.S. 755, 765 (1973).

[92] 688 F.2d at 964. (J.S. 10a-11a.)

[93] *Id.* (J.S. 11a.)

Rogers with the plurality's opinion in *Bolden* reveals that the Fifth Circuit's interpretation of *Rogers* was erroneous. In any event, a comparison of the Court's opinion in *Rogers* with the Fifth Circuit's opinion in *McMillan I* leaves no doubt that *Rogers* did not justify the Fifth Circuit's decision to grant rehearing and vacate its decision in *McMillan I*. Further, a review of the facts unambiguously shows that there was no evidence that appellants established or maintained the at-large election system for a discriminatory purpose.

A. The Standard This Court Articulated in *Rogers* Does Not Differ from the Standard the Plurality Enunciated in *Bolden* and, in Any Event, Does Not Differ from the Standard the Fifth Circuit Applied in *McMillan I*.

In discussing the standard of proof necessary to establish discriminatory purpose, the *Bolden* plurality concluded that "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, [but] satisfaction of those criteria is not of itself sufficient proof of such a purpose."[94] In *Rogers*, the Court rejected the argument that the district court's judgment was infirm because that court had employed the *Zimmer* factors. In upholding the Fifth Circuit's conclusion that the district court had applied the proper legal standard, this Court explained:

> The District Court . . . demonstrated its understanding of the controlling standard by observing that a determination of discriminatory

[94] 446 U.S. at 73. The plurality concluded that the presence of the *Zimmer* factors only may establish discriminatory effect. *Id.* at 71-73; *accord Rogers*, 457 U.S. at ____, 102 S.Ct. at 3277.

> intent is 'a requisite to a finding of unconstitutional vote dilution' under the Fourteenth and Fifteenth Amendments . . . . Furthermore, while recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was 'not limited in its determination only to the *Zimmer* factors' but could consider other relevant factors as well . . . . For the most part, the District Court dealt with the evidence in terms of the factors set out in *Zimmer* and its progeny, but as the Court of Appeals stated: 'Judge Alaimo employed the constitutionally required standard . . . . [and] did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent.'[95]

As is apparent, the opinions of the *Bolden* plurality and the Court in *Rogers* reflect the same view of the *Zimmer* factors. Those factors are relevant to a finding of discriminatory intent, but, alone, the presence of an aggregate of those factors may not establish such an intent. Both opinions require the trial court to consider and find present relevant evidence other than the *Zimmer* factors. Hence, rather than reflecting a more favorable view of the *Zimmer* factors, the distinction between *Bolden* and *Rogers* is that, in *Bolden,* the district court limited its inquiry to the *Zimmer* factors whereas, in *Rogers,* the court went beyond, and found present evidence other than, the *Zimmer* factors.[96] The Fifth Circuit erred in otherwise concluding.

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[95] *Rogers,* 457 U.S. at ____, 102 S.Ct. at 3278 (citations omitted).

[96] *Compare Bolden,* 455 U.S. at 71-73, *with Rogers,* 457 U.S. at ____, ____, 102 S.Ct. at 3278, 3280.

Moreover, even assuming arguendo that the view of the *Zimmer* factors the Court conveyed in *Rogers* is more favorable than that expressed in *Bolden*, the view conveyed in *Rogers* is the same as that expressed in *McMillan I*. This may be explained by the fact that, as the above quotation indicates, the view expressed in *Rogers* was derived largely from the Fifth Circuit's opinion in *Lodge v. Buxton*,[97] which opinion was rendered just twenty-nine (29) days after the Fifth Circuit's opinion in *McMillan I*. In *McMillan I*, the Fifth Circuit concluded that "[f]ortunately, the district court below correctly anticipated that the *Arlington Heights* requirement of purposeful discrimination must be met, and thus made explicit findings concerning intent in addition to and apart from its *Zimmer* findings."[98] Comparing this conclusion with the above quotation from *Rogers* confirms that the Court in *Rogers* and the Fifth Circuit in *McMillan I* treated identically the relationship of the *Zimmer* factors to a finding of discriminatory intent. Accordingly, the portion of the *Rogers* decision which addresses the probative value of the *Zimmer* factors did not furnish the Fifth Circuit a valid basis for vacating the portion of its decision in *McMillan I* concerning the County Commission and substituting therefor its decision in *McMillan III*.

Similarly, the Fifth Circuit's unexplained conclusion in *McMillan III* that the Court's opinion in *Rogers* gives greater deference to the findings of a district court than the plurality's opinion in *Bolden* also was incorrect. In *Rogers*, the Court simply reiterated the requirement of Fed.R.Civ. P. 52(a) that a reviewing court is not to set aside the findings of fact of a district court unless those

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[97] 639 F.2d 1358 (5th Cir. 1981), *aff'd. sub nom. Rogers.*

[98] 638 F.2d at 1243. (J.S. 39a.)

findings are clearly erroneous.[99] That requirement, however, was in effect and governed review of district court findings long before the decision in *Bolden*.[100] Because the *Bolden* plurality concluded that, by failing to consider factors other than the *Zimmer* factors, the district court had applied the incorrect legal standard, it was unnecessary for the plurality to address expressly the deference to be given the findings of the district court. However, in view of the basis for the plurality's opinion and the length of time the clearly erroneous standard had been in effect, there were no grounds for the Fifth Circuit to conclude that the Court in *Rogers* accorded greater deference to district court findings than the plurality in *Bolden*.

B. There Was No Evidence that the At-Large Election System Was Established or Maintained for a Discriminatory Purpose, and the District Court's Finding to the Contrary, Therefore, Was Clearly Erroneous.

The Fifth Circuit erred not only in concluding that this Court's decision in *Rogers* reflects a more favorable view of the *Zimmer* factors and a greater deference to the findings of the district court than the plurality's opinion in *Bolden* but also erred in its application of the clearly erroneous standard to the district court's findings. That standard does not insulate a district court's findings from appellate review. While those findings are entitled to deference, they must be set aside as clearly erroneous if, "although there is evidence to support . . . [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been com-

[99] 457 U.S. ____, 102 S.Ct. at 3278-79.

[100] *See, e.g.*, United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

mitted."[101] A review of the evidence, together with a comparison of that evidence to the dramatically different facts necessary to sustain the district court's findings in *Rogers*, reveal that the district court committed a mistake in finding that appellants were maintaining the at-large election system for a discriminatory purpose.[102]

1. The Provision for Escambia's County Commissioners To Be Elected At-Large Is a Requirement of the Florida Constitution; Hence, Appellants Were and Are Not Responsible for that Provision.

The provision for Escambia's county commissioners to be elected at-large is, and always has been, a requirement of Florida's Constitution. There is no evidence in the record to show that appellants in any way were responsible for the enactment of that state constitutional provision.[103] Moreover, any change in that provision would require an amendment to Florida's Constitution, a process over

[101]United States v. United States Gypsum Co., 333 U.S. 364,395 (1948); *accord, e.g.*, Kelley v. Southern Pacific Co., 419 U.S. 318, 322-23 (1974); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1949).

[102]In addition to the comparison set forth at 33-39 *infra*, the amici curiae brief filed by the State Association of County Commissioners of Florida, Inc. and numerous non-charter counties in Florida in support of this appeal provides a factual comparison of Escambia and Burke County, Georgia, the county whose at-large election system was challenged in *Rogers*. Motion for Leave To File and Brief of Amici Curiae State Association of County Commissioners, Inc. and the Undersigned Non-Charter Counties of the State of Florida in Support of Appeal at 9-13.

[103]The district court's opinion recognizes that appellants were not responsible for the creation of the at-large system of electing county commissioners. *See* McMillan v. Escambia County, Fla. PCA No. 77-0433 typescript op. at 23-25 (N.D. Fla. July 10, 1978). (J.S. 92a-93a.)

which appellants have no control.[104] Appellees not only failed to name as parties those persons or entities arguably responsible for the state constitutional requirement of at-large elections, e.g., the State of Florida, the Governor of Florida or the Florida Legislature and its members, but also failed to offer any evidence, and the court failed to find, that the constitutional provision is being maintained for a discriminatory purpose.[105] For this reason, alone, the court's finding that appellants were maintaining the at-

[104] *See* Fla. Const. art. XI (procedures for amending Florida's Constitution).

[105] The absence of any causal connection between appellants and the harm appellees have alleged raises the issue whether appellees' allegations even satisfy the "case or controversy" requirement of U.S. Const. art. III, § 2, cl. 1, necessary to the exercise of a federal court's subject matter jurisdiction. In response to appellees' Complaint, appellants answered, by way of affirmative defenses, that they were not responsible for the at-large system of electing county commissioners and that the State of Florida, the Department of State of Florida and the Governor of Florida were necessary parties. Answer and Affirmative Defenses – Escambia County at 3. (J.A. 52.) By letter dated August 4, 1977, the court, without explanation, rejected appellants' contention that the State, Department of State and Governor were necessary parties. (J.A. 56.) Although the issue was not pressed on appeal, this Court often has stressed that, even if not previously raised by the parties, issues pertaining to a court's subject matter jurisdiction may be raised and decided at any stage of the proceedings. *E.g.*, Butler v. Dexter, 426 U.S. 262, 263 n. 2 (1976); Philbrook v. Glodgett, 421 U.S. 707, 721 (1975); Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884); M'Kinney v. Carroll, 37 U.S. (12 Peters) 66, 68 (1838).

As recently interpreted by this Court,

> Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 . . . (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern*

large system of electing Escambia's county commissioners was clearly erroneous.

2. Racial Considerations Play No Role in the County Commissioners' Preference for the At-Large System.

Rather than focusing on those actually responsible for maintenance of Florida's constitutional requirement of at-large elections, the court, instead, focused its inquiry entirely on appellants. Although the court did not explain why it took this approach, presumably it did so because Fla. Const. art. VIII, § 1(c); Fla. Stat. §§ 125.60-.64 (1981) allow Florida's counties to adopt and be governed by a charter which, inter alia, provides for an election system other than the at-large system the Florida Constitution requires.[106] Even if the court were correct in taking this approach, the record does not support the findings the court made with respect to appellants to support its findings of discriminatory intent.

With one exception, the district court limited its inquiry to the *Zimmer* factors.[107] That exception was the County Commission's decision not to include in a charter referen-

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Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 . . . (1976).

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); *accord, e.g.*, Watt v. Energy Action Educational Foundation, 454 U.S. 151, 161 (1981); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977). Those who fail to make such a showing "may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 475-76. Appellants failed to make such a showing, and, therefore, the decisions below cannot stand.

[106]Sixty-two (62) of Florida's sixty-seven (67) counties have remained non-charter counties.

[107]*McMillan III*, 688 F.2d at 965. (J.S. 13a.)

dum a proposal for county commissioners to be elected from single-member districts. The County Commissioners who testified at trial stated that that decision was based on their conviction that the at-large election system is best for Escambia because there are issues which transcend district lines and, under an at-large system, commissioners must represent the interests of the county as a whole whereas, under a single-member district system, commissioners would tend to represent only the interests of their respective districts.[108] As the Fifth Circuit pointed out in its decision in *McMillan I*, and did not dispute in *McMillan III*, "the plaintiffs introduced no evidence to the contrary."[109] Following the trial, the Commissioners indicated that their decision also reflected the desire to retain their incumbency.[110] As the Fifth Circuit further pointed out in *McMillan I* and reiterated in *McMillan III*, the "desire to maintain one's incumbency does not equal racially discriminatory intent."[111]

The district court, however, did equate the County Commissioners' decision with discriminatory intent: "To this court the reasonable inference to be drawn from their actions in retaining at-large districts is that they were motivated, at least in part, by the possibility single district elections might result in one or more of them being displaced in subsequent elections by blacks."[112] Apart

[108]Transcript at 1478, 1500-01, 1517-18, 1558-59 (testimonies of Commissioners Beck, Kelson, Deese and Kenney respectively). (J.A. 481, 497-98, 510-11, 540.)

[109]638 F.2d at 1245. (J.S. 43a.)

[110]Defendants' Post-Trial Memorandum at 18. (R. 950.)

[111]*McMillan III*, 688 F.2d at 969 n. 19 (J.S. 20a); *accord McMillan I*, 638 F.2d at 1245 (J.S. 42a-43a); *see also Rogers*, 457 U.S. at ____, 102 S.Ct. at 3292 (Stevens, J., dissenting).

[112]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 31 (N.D. Fla. July 10, 1978) (footnote omitted). (J.S. 98a.)

from other considerations, the court's "inference" defies logic. The court noted that, under a single-member district election system, the district lines could be gerrymandered to produce, at most, one district with a black majority.[113] Assuming, as the court found, that blacks vote as a bloc for black candidates,[114] only one of five commissioners arguably would need to be concerned about being replaced by a black. The other four commissioners would not share such a concern; and the court's inference of discriminatory purpose may not be explained by the unanimous support of all five County Commissioners for the at-large system.[115]

Moreover, the district court's emphasis on the County Commission's decision not to include in the charter referendum a proposal for a single-member district election system is misplaced. The County Commission, of course, does not have the power to adopt a charter. Rather, this power lies with the people of Escambia.[116] As the court observed, the 1977 charter referendum, without a provision for county commissioners to be elected at-large, was defeated.[117] Appellees did not attempt to show,

[113] *Id.* n.10. (J.S. 98a.)

[114] *Id.* at 13. (J.S. 82a.)

[115] It is noteworthy that the charter commissions' recommendations for a single-member district election system were not prompted by complaints by blacks that the at-large system was diluting their voting strength. Commissioner Tennant, who, prior to becoming a county commissioner, served on the County Commission's charter commissions, testified that the overriding reason the charter commissions favored a single-member district election system was "economics," i.e. the charter commission simply was looking for possible ways to reduce the costs of running for office. Transcript at 577-78, 587, 591-92. (J.A. 312-13, 319, 322-23.)

[116] Fla. Const. art. VIII, § 1(c); Fla. Stat. §§ 125.60-125.64 (1981).

[117] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 29 (N.D. Fla. July 10, 1978). (J.S. 96a.)

and the court did not find, that the defeat of the charter referendum was in any way related to the County Commission's exclusion of a proposal for a single-member district election system. Indeed, any such assertion would be unwarranted because, on November 6, 1979, after the trial, the people of Escambia voted on and defeated a charter referendum which, inter alia, provided for a seven-member county commission with five members to be elected from single-member districts.[118] Under these circumstances, it is apparent that racial considerations explain neither why the County Commission supported the at-large election system nor why Escambia's county commissioners continued to be elected under the at-large system Florida's Constitution requires.

As previously discussed, the County Commission's decision not to include in a charter referendum a proposal for a single-member district election system was the only non-*Zimmer* factor the district court considered. If, as *Rogers* established, the presence of an aggregate of the *Zimmer* factors, alone, is insufficient to establish discriminatory intent and the only non-*Zimmer* factor shows an absence of such intent, the district court's finding that appellants were maintaining the at-large system of electing Escambia's county commissioners for a discriminatory purpose necessarily must be clearly erroneous; and further inquiry should be unnecessary. However, assuming arguendo that consideration of the *Zimmer* factors is necessary, the district court's findings thereunder also were clearly erroneous.

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[118] *See supra* p. 13.

3. Blacks in Escambia Have Equal Access to the Candidate Selection Process, Are Able To Participate Fully and Equally in All Aspects of the Political Process, and Appellants Are Responsive to the Needs of Escambia's Black Citizens.

Unlike *Rogers,* where the court found that blacks always had been a "substantial majority" of the population," but, due primarily to the effects of past discrimination, a "distinct minority" of the registered voters,[119] blacks in Escambia constitute approximately the same percentage of the registered voters as they constitute percentage of the population[120]. Further, the parties agreed, and the court found, that blacks and whites register to vote at approximately the same rate and that there are no slating organizations which prevent blacks from participating in the election system.[121] Indeed, the court found that "[a]ctive efforts are made to encourage eligible citizens, both black and white, to register and to vote . . . . [and t]oday there is no significant difference between blacks and whites in that respect in the county . . . ."[122] In addition, the court also found that "[w]hite candidates do actively seek the votes of blacks."[123] Further, as shown at 5-6 *supra,* the record

[119]457 U.S. at ____, 102 S.Ct. at 3279.

[120]*See supra* pp. 3, 5.

[121]Pretrial Stipulation ¶ F(1), (18) (J.A. 68, 74); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 10 (N.D. Fla. July 10, 1978). (J.S. 79a-80a.)

[122]McMillan v. Escambia County, Fla., No. 77-0432, typescript op. at 10 (N.D. Fla. July 10, 1978). (J.S. 79a-80a.)

[123]*Id.* at 15. (J.S. 84a.) The County Commissioners testified that they not only actively seek the support of blacks, but that they consider the votes of blacks to be important to their successes as candidates and that, to this end, blacks participate in their campaigns. Transcript at 1466-67, 1498-99, 1514-16, 1555-56 (trial testimonies of

plainly shows that blacks in Escambia are active in the Democratic Party and that the Democratic Party supports equally black and white Democratic candidates. Nevertheless, the court found that blacks are denied access to the political process.[124]

The court based this finding on "the requirement of a filing fee of approximately $1,000.00" and the "consistent racially polarized or bloc voting pattern which operates to defeat black candidates."[125] With respect to the "filing fee," the court first ignored the fact that it is provided for by state law[126] and that, consequently, appellants in no

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Commissioners Beck, Kelson, Deese and Kenney respectively). (J.A. 472-73, 496-97, 508-10, 537-38.) This is further confirmed by the testimony of Lawrence Green, Democratic Precinct Chairperson for Escambia Precinct 53, who is black and testified that, during the many years in which he has been active in Escambia political campaigns, all candidates actively seek his support. *Id.* at 1992-97. (J.A. 560-564.)

[124]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 10, 19 (N.D. Fla. July 10, 1978). (J.S. 80a, 88a.) Although the court addressed separately past discrimination, it did not distinguish, as do the *Zimmer* factors, access to the candidate selection process from participation in the elector process. The facts pertaining to the candidate selection and elector processes overlap and are discussed jointly at 33-37 *supra* and *infra*.

[125]*Id.* at 10, 11. (J.S. 80a.) The court also relied on the lack of success blacks had had in those instances in which they had chosen to run. *Id.* The relative import of such a finding is discussed at 41 *infra*.

[126]*See supra* pp. 4-5. The court asserted that the "filing fee" is $1,000.00 because of its assumption that the fee is five (5) percent of a county commissioner's annual salary. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 15 (N.D.Fla. July 10, 1978). (J.S. 84a.) This assumption is incorrect. As discussed at 4-5 *supra*, the filing fee is three (3) percent of a county commissioner's annual salary. In addition, the candidate's party may levy a party assessment of not more than two percent of a county commissioner's annual salary; and the amount of the assessment may be decreased or eliminated by the party's executive committee.

way are responsible for that provision. More importantly, the court also ignored the fact that the Florida statutes provide that if a person who wishes to become a candidate is unable to pay the filing fee and, if levied, the party assessment without imposing an undue burden on his or her financial resources, he or she may gain ballot access through a petition signed by only three (3) percent of the qualified electors in the county from the party whose nomination he or she seeks.[127] Under these circumstances, the provision in Florida law for the payment of a filing fee and possible payment of a party assessment may not be viewed as imposing a barrier to access for blacks to the political process; and the district court clearly erred in otherwise finding.

In *Rogers*, there was "overwhelming evidence of bloc voting along racial lines."[128] No such evidence exists in this case. Although the court found a consistent pattern of racially polarized or bloc voting, the court relied almost entirely on statistical evidence, consisting of regression analyses, appellees submitted.[129] In view of the fact that only three (3) blacks had run for the County Commission and had run only over a four (4) year period,[130] the probative value of this statistical evidence and the finding derived therefrom are, at best, dubious. This is confirmed by appellees' own expert, Dr. Charles L. Cotrell, who, in testifying about the appellees' statistical evidence, expressed doubt that that evidence could provide the basis for a find-

[127] *See supra* p. 5. Similarly, an independent candidate who is unable to pay the filing fee may gain ballot access through a petition signed by three percent of the registered voters in the county. *Id.* note 12.

[128] 457 U.S. at ____, 102 S.Ct. at 3279.

[129] *See* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 11-14 (N.D. Fla. July 10, 1978). (J.S. 80a-83a.)

[130] One black, John Reed, ran twice. *See supra* note 22.

ing of racially polarized voting in elections for the County Commission because of the few instances in which blacks had run.[131]

Additionally, regression analysis does not account for such factors as the qualifications of the candidates and incumbency.[132] Regression analysis also would show polarization where blacks vote as a bloc for a black candidate and whites also vote for that candidate but to a lesser extent.[133] Indeed, appellees' expert, Dr. Glenn D. Curry, stated that a regression analysis could show polarization where blacks in a county are approximately sixteen (16) percent of the registered voters and a black candidate wins an election.[134] Accordingly, contrary to the court's finding, appellees' statistical evidence fails to show a pattern of racially polarized voting.[135]

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[131]Transcript, under separate cover, at 30-31. (J.A. 419.)

[132]Transcript at 307-08, 338-40 (testimony of appellees' expert, Dr. Glenn D. Curry). (J.A. 229-30, 251-53.)

[133]*Id.* at 333-38 (J.A. 247-52.); *Id.*, under separate cover, at 46-51 (testimony of appellants' expert, Dr. Manning J. Dauer). (Pages 47-51 of Dr. Dauer's testimony are reprinted in the Joint Appendix at 1591-94.) In this regard, it is noteworthy that appellees even asserted that "[u]nquestionably, a sizeable minority of white voters sometimes vote for black candidates." Plaintiffs' Pretrial Brief and Opposition to Defendants' Motions for Summary Judgment at 8. (R. 849.)

[134]Transcript at 337. (J.A. 251.)

[135]The majority of the statistical evidence and testimony concerning the polarization issue as well as the court's discussion of that issue centered on elections for the Pensacola City Council and the Escambia School Board, *see* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 11-15 (N.D. Fla. July 10, 1978). (J.S. 81a-84a.) Blacks had run more frequently for those offices, and had run over a longer period of time, than for the County Commission, i.e., blacks had run for the Pensacola City Council nineteen (19) times over a twenty-two (22) year period, between 1955 and 1977, and had run five (5) times for the Escambia School Board over a six (6) year period, between 1970 and 1976. *See Id.* apps. A-C. (J.A. 107-13.)

The record in this case leaves no doubt that blacks in Escambia have full and equal access to the candidate selection process and the entire elector process.[136] The evidence simply does not support the court's clearly erroneous finding to the contrary.[137]

With respect to the remaining, primary *Zimmer* factors, the court in *Rogers* found "[e]xtensive evidence" that the elected officials were "unresponsive and insensitive to the needs of the black community."[138] In contrast, the court

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Arguably, therefore, there may have been more of a basis for the court's findings of patterns of polarization in those elections, particularly elections for the Pensacola City Council, than in elections for the County Commission. It appears that the court's finding of polarization in elections for the County Commission was based more on its interest in consistency than on the facts presented concerning County Commission elections.

This observation is applicable generally to the other findings the court made. As reflected in the court's July 10, 1978 opinion, the evidence which was presented centered primarily on the facts surrounding the creation and maintenance of the systems of electing persons to Escambia School Board and the Pensacola City Council, which have no bearing on the creation and maintenance of the system of electing Escambia's county commissioners. In view of the absence of evidence of discriminatory intent in the County Commission aspect of this suit, it is evident that the district court did not review the facts, and make its findings, regarding the County Commission independently of its findings on the School Board and City Council.

[136]Further evidence of the fact that blacks have full and equal access to the political processes in Escambia is found in the testimony of appellees' witness, William H. Marshall, an officer in the Escambia Democratic Executive Committee, *see supra* pp. 5-6, who is black and expressly stated that he has been involved actively in the political process in Escambia and has had full access to that process. Transcript, under separate cover, at 29-30.

[137]Under the *Zimmer* analysis, because past discrimination is only relevant to the present ability of blacks to participate in the elector process, the fact that blacks are able to participate fully in that process obviates the need to discuss past discrimination.

[138]457 U.S. at ____, 102 S.Ct. 3280.

in this case found appellants generally to be responsive to the needs of Escambia's black citizens.[139] Like the court in *Rogers*, the court also found that the policy underlying the enactment of the provision for at-large elections was not a function of race but that the at-large system was being maintained for a discriminatory purpose.[140] However, as previously discussed, the court in this case did not consider the policy underlying Florida's continued preference for its constitutional provision requiring at-large elections.[141] While the court did find that the County Commission's preference for the at-large election system was motivated by racial considerations, that finding was based on the decision by the County Commission not to include in a charter referendum a proposal for a single-member district election system.[142] Appellants already have shown that that finding was clearly erroneous and that the County Commissioners' preference of the at-large system was not motivated by racial considerations.[143]

Because none of the primary *Zimmer* factors is present, there is nothing to be enhanced and it should be unnecessary to consider the enhancing *Zimmer* factors. Even if considered, however, consideration of these factors further shows that the district court's finding of discriminatory intent was clearly erroneous. In *Rogers*, the

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[139]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 15, 19 (N.D. Fla. July 10, 1978). (J.S. 85a, 88a.)

[140]*Compare Rogers*, 457 U.S. at ____, 102 S.Ct. at 3280, *with* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 25 (N.D. Fla. July 10, 1978) (J.S. 93a).

[141]*See supra* pp. 27, 29.

[142]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 29-30 (N.D. Fla. July 10, 1978). (J.S. 96a-98a.)

[143]*See supra* pp. 29-32.

court found that the size of the county had made it difficult for blacks to go to polling places and to campaign.[144] The court also found there to be no residency requirement, which allowed all candidates to reside in all-white neighborhoods, and a majority vote requirement.[145] Although there was no anti-single shot voting provision, the court found that candidates were required to run for numbered places, which prevented "a cohesive political group from concentrating on a single candidate."[146]

In this case, the court recognized that there is no anti-single shot voting provision and no majority vote requirement in the general election and that there is a requirement that each candidate reside in the district from which he or she runs.[147] However, the court also found that blacks cannot concentrate their votes because candidates run for "numbered places."[148] The court ignored the fact that the so-called "numbered place" requirement is simply a function of the residency requirement, which prevents all candidates from living in all-white neighborhoods. Finally, the court found that Escambia is "geographically large."[149] However, the court failed to explain what effect, if any, Escambia's size has on the access of blacks to the

[144]457 U.S. at ____, 102 S.Ct. at 3280-81.

[145]*Id.* at ____, 102 S.Ct. at 3281.

[146]*Id.*

[147]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 18 (N.D. Fla. July 10, 1978). (J.S. 87a-88a.)

[148]*Id.*

[149]*Id.* Escambia is, however, geographically smaller than a majority of Florida's counties. Of Florida's sixty-seven (67) counties, thirty-seven (37) are larger than Escambia. *See* Bureau of the Census, U.S. Dept. of Commerce, PC 80-1-A11, 1980 Census of Population – Florida 8 (1982).

political process. Escambia's Supervisor of Elections, Joe Oldmixon, testified that his office had received no complaints that polling places are inaccessible to blacks;[150] and appellees offered no evidence to the contrary. When considered together with the fact that blacks and whites register to vote at approximately the same rate,[151] there is no doubt that Escambia's size has not had a negative impact on the voting strength of Escambia's black citizens.

In sum, an aggregate of the *Zimmer* factors and the one, non-*Zimmer* factor the court considered fail to support the district court's finding that appellants were maintaining the at-large system of electing Escambia's county commissioners for a discriminatory purpose and, in fact, show that finding to have been clearly erroneous. In *McMillan I*, the Fifth Circuit reviewed the entire record and "found no evidence of racial motivation by the county commissioners in retaining the at-large system."[152] Even though the applicable legal standard the Fifth Circuit applied in *McMillan I* was no different from the legal standard this Court articulated in *Rogers* and even though no new evidence was introduced, the Fifth Circuit, in *McMillan III*, upheld the district court's finding of discriminatory intent. Apart from the Fifth Circuit's erroneous conclusion that this Court's decision in *Rogers* changed the applicable legal standard, the above review of the record shows that the decision in *McMillan III* may be explained only by the Fifth Circuit's having misinterpreted the clearly erroneous standard as precluding it from disturbing the district court's findings.

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[150]Transcript at 2022.

[151]*See supra* p. 5.

[152]638 F.2d at 1245. (J.S. 42a.)

This Court's decision in *Rogers* leaves no doubt that an at-large election system may not be held to be unconstitutional unless a court finds evidence to show that the system was established or is maintained for a discriminatory purpose. All the record in this case shows is that, in the few instances in which they have chosen to run for the County Commission, blacks have not been elected and are not represented on the County Commission in proportion to their percentage of the population. As this Court held in *Whitcomb v. Chavis:*[153]

> The mere fact that one interest group or another concerned with the outcome of. . . elections has found itself outvoted and without legislative seats provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.[154]

Additionally, this Court consistently has held that minorities are not entitled to proportional representation.[155] The district court's decision and the Fifth Circuit's affirmance of that decision run directly contrary to these well-established principles. As such, those decisions stand as an invitation to minorities to challenge, and courts to hold unconstitutional, at-large election systems merely because minorities either are defeated at the polls or are not represented on governing bodies in proportion to their percentage of the population. Unless this Court is

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[153]403 U.S. 124 (1971).

[154]*Id.* at 154-55; *accord* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 166 (1977) (plurality opinion); *see Rogers*, 457 U.S. at ____, 102 S.Ct. at 3279.

[155]*E.g.*, White v. Regester, 412 U.S. 755, 765-66 (1973); *Whitcomb*, 403 U.S. at 149-50.

willing to effect such a drastic change in constitutional law, the decisions below must not be allowed to stand.

II. Following a Decision Striking Down an At-Large Election System, the Failure of a Court To Consider as a "Legislative Plan" a Remedy a Legislative Body Adopts and the Consequent Imposition by a Court of a Judicially Created Remedy Is an Unwarranted Preemption of a Legislative Task.

The lower courts' decisions on the remedy issue also represent a dramatic and unwarranted departure from this Court's well-established principles. This Court frequently has admonished lower courts that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt."[156] The courts below disregarded this teaching. Rather than considering as a "legislative plan" the remedial election system and reapportionment plan[157] the

[156] Wise v. Lipscomb, 437 U.S. 535, 539 (1978) (plurality opinion); *accord* Upham v. Seamon, 456 U.S. 37, 41-42 (1982); *Wise*, 437 U.S. at 550 (Marshall, J., dissenting); Connor v. Finch, 431 U.S. 407, 414 (1977); Chapman v. Meier, 420 U.S.1, 26-27 (1975); White v. Weiser, 412 U.S. 783, 795 (1973); Burns v. Richardson, 384 U.S. 73, 89 (1966).

[157] Neither the Fifth Circuit nor the district court specifically addressed the remedial reapportionment plan the County Commission adopted but, rather, limited their opinions to the County Commission's proposed, remedial election system. The district court's December 3, 1979 remedial Order, however, imposed a judicially created reapportionment plan and further ordered the Court Commission to reapportion the county commissioners' districts following each decennial census. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1, 2 (N.D. Fla. Dec. 3, 1979). (J.S. 59a, 60a.) As discussed at 17 *supra*, prior to the decision in *McMillan III*, the 1980 census was published and, pursuant to Fla. Const. art. VIII, § 1(e); Fla. Stat. § 124.01 (1981), the County Commission reapportioned the county commissioners' districts according to the required one person, one vote principle.

County Commission adopted and submitted to the court, the district court imposed a judicially created remedy and, in *McMillan III*, the Fifth Circuit affirmed that remedy.[158]

While silent on the reapportionment issue, the issue of the validity of the district court's reapportionment plan was moot when the Fifth Circuit issued its decision in *McMillan III;* and that decision only may be read as affirming that part of the district court's remedial Order which directed the County Commission to reapportion the county commissioners' district following each census. However, to the extent that either the opinion of the district court or the opinion of the Fifth Circuit may be read as upholding the power of the district court to impose a judicially created reapportionment plan, the arguments appellants have set forth at 44-49 *infra* with respect to the imposition of a judicially created election system are applicable to the imposition of a judicially created reapportionment plan. Indeed, those arguments apply even more forcefully because the Florida Constitution and statutes not only allow but require non-charter county commissions to reapportion county commissioners' districts.

[158]As discussed at 11-14 *supra*, the primary difference between the remedy the County Commission adopted and the remedy the court created was that the County Commission's remedy provided for a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large while the court's remedy provided for a five-member county commission with all members to be elected from single-member districts. It was necessary for the courts to decide whether the County Commission's proposal could be considered a "legislative plan" because of this Court's holdings that, absent compelling reasons, a judicially created remedy must avoid the use of at-large districts but that a "legislative plan" may employ such districts. *E.g.*, McDaniel v. Sanchez, 452 U.S. 130, 138-39 (1981) (citing Connor v. Finch, 431 U.S. 407, 414-15 (1977); Chapman v. Meier, 420 U.S. 1, 26-27 (1975); Mahan v. Howell, 410 U.S. 315 (1973)).

A. The Fifth Circuit and the District Court Erred in Failing To Apply the Analysis in *Wise* of Justice Powell.

The decisions below were based on the court's interpretation of *Wise v. Lipscomb* and Fla.Const. art. VIII, § 1(f). Both the Fifth Circuit and the district court adopted Justice White's analysis, rather than Justice Powell's analysis, in *Wise*.[159] In addition, the Fifth Circuit acknowledged that "[i]n this case, however, we are presented with a fact situation that. . . . under Justice Powell's analysis would be considered a legislative plan."[160] This Court's decision in *McDaniel v. Sanchez*[161] confirms that the district court and the Fifth Circuit should have adopted Justice Powell's analysis in *Wise* and erred in adopting Justice White's analysis.

The issue before the Court in *McDaniel* turned on whether a reapportionment plan a legislative body adopted and a district court ordered into effect in response to a decision holding unconstitutional the existing reapportionment plan was a court-ordered plan or a "legislative plan." In holding that the reapportionment plan was a "legislative plan" and, thus, subject to preclearance under section 5 of the Voting Rights Act of 1965,[162] the Court reasoned:

> The application of the statute [section 5] also is not dependent upon any showing that the Com-

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[159] *McMillan III*, 688 F.2d at 972 (J.S. 28a); *see* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 2-3 (N.D. Fla. Sept. 24, 1979) (J.S. 67a-69a).

[160] *McMillan III*, 688 F.2d at 972 n. 25. (J.S. 29a.)

[161] 452 U.S. 130 (1981). The decision in *McDaniel* was rendered after the Fifth Circuit's decisions in *McMillan I* and *McMillan II* but before its decision in *McMillan III*.

[162] 42 U.S.C. § 1973c (1976).

> missioners Court had authority under state law to enact the apportionment plan at issue in this case. As Justice POWELL pointed out in *Wise v. Lipscomb*, . . . the essential characteristic of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic.[163]

Particularly in light of the Fifth Circuit's recognition that, under Justice Powell's analysis, the County Commission's proposed remedy would be considered a "legislative plan," the decision by the district court and the Fifth Circuit to disregard the County Commission's proposal cannot stand.[164]

B. Florida Law Secures Non-Charter County Commissions Broad Powers, and, Therefore, Even Under Justice White's Analysis in *Wise*, the Courts Below Should Have Considered as a "Legislative Plan" the County Commission's Proposed Remedy and Erred in Imposing a Judicially Created Remedy.

Even under Justice White's analysis in *Wise*, the lower courts' decisions were wrong. Of particular significance to the courts below was Justice White's observation that,

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[163] *McDaniel*, 452 U.S. at 152. Under Justice White's analysis in *Wise*, a remedy a legislative body adopts may be considered a "legislative plan" only if state law provides that body with the power, express or implied, to adopt the remedy. *Wise*, 437 U.S. at 544 & n.8.

[164] Justice Powell's opinion in *Wise* leaves open the question whether a remedy a legislative body adopts may be considered a "legislative plan" where, rather than being silent, the state constitution and statutes expressly prohibit the legislative body from adopting, for consideration as a "legislative plan," a remedy. As shown at 45-48 *infra*, this case does not present that question.

following a decision holding unconstitutional the existing system for elections to the Dallas City Council, there was no state constitutional, statutory or judicial prohibition on the authority of the Dallas City Council to enact a new election system.[165] Both courts concluded that, unlike Texas law, Fla. Const. art. VIII, § 1(f) "expressly limits the legislative powers of the County Commission to those specifically authorized by state law," which does not include authorization for a non-charter county commission to adopt a remedial election system.[166] The portion of Fla. Const. art. VIII, § 1(f) on which the courts relied provides: "Counties not operating under county charters shall have such power of self-government as is provided by general or special law."[167] However, the courts ignored the remaining portion of that provision as well as the Florida statutes and a Florida Supreme Court decision concerning the powers of non-charter county commissions. Specifically, Fla. Const. art. VIII, § 1(f) also provides: "The board of county commissioners of a county not operating under a charter may enact. . . county ordinances *not inconsis-*

[165] *McMillan III*, 688 F.2d at 972 (J.S. 27a); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 2 (N.D. Fla. Sept. 24, 1979) (J.S. 67a-68a.).

[166] *McMillan III*, 688 F.2d at 972 (J.S. 29a); *accord* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D.Fla. Sept. 24, 1979) (J.S. 68a.).

[167] *McMillan III*, 688 F.2d at 971 (J.S. 25a-26a.); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D. Fla. Sept. 24, 1979) (J.S. 68a.).Both courts quoted Fla. Const. art. VIII, § 1(f). The district court, however, erroneously quoted this section as providing that "the Escambia County Commission has *'only* such power of self government [sic] as is provided by general or special law.'" McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D. Fla. Sept. 24, 1979) (emphasis added). (J.S. 68a.) This inaccurate quotation apparently was a major factor in the court's erroneous decision.

tent with general or special law."[168] The Florida statutes provide: "The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, *this power shall include, but shall not be restricted to,* the power to. . . ."[169] and further provide: "The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and *to secure for the counties the broad exercise of home rule powers* authorized by the State Constitution."[170] As interpreted by the Florida Supreme Court:

> This provision of the Florida Constitution [art. VIII, § 1(f)] also authorizes the board of county commissioners of such a county to enact ordinances in the manner prescribed by Chapter 125, Florida Statutes, which are not inconsistent with general law.
>
> *The intent of the legislature* in enacting the recent amendments to Chapter 125, Florida Statutes, *was to enlarge the powers of counties through home rule to govern themselves.*
>
> . . . Unless the legislature has preempted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence [in Fla. Stat. § 125.01] has authority to act through the exercise of home rule power.[171]

[168](Emphasis added).

[169]Fla. Stat. § 125.01 (1) (1981) (emphasis added).

[170]*Id.* § 125.01(3) (b) (1981) (emphasis added).

[171]Speer v. Olson, 367 So.2d 207, 210-11 (Fla. 1978) (emphasis added). The interpretation of state law by the highest court of a state is, of course, binding on this Court and all other federal courts. *E.g.*, Brown v. Ohio, 432 U.S. 161-167 (1977); Gurley v. Rhoden, 421 U.S. 200, 208 (1975); Garner v. Louisiana, 368 U.S. 157, 169 (1961).

As is readily apparent, Florida law provides non-charter county commissions with expansive powers. The Florida Legislature has not sought to preempt the field of providing a remedial election system or reapportionment plan in response to a decision striking down the system of electing a non-charter county's county commissioners. Under these circumstances, the County Commission certainly was acting within its powers in adopting the remedy appellants submitted to the court. Accordingly, under Justice White's analysis in *Wise*, the courts below erred in disregarding the remedy the County Commission adopted.

The consequence of the erroneous decisions by the Fifth Circuit and the district court is that a federal court unjustifiably has preempted the performance by a legislative body of a legislative function.[172] This Court must not

[172]On remand, the district court recognized that it and the Fifth Circuit had erred in adopting Justice White's analysis, rather than Justice Powell's analysis, in *Wise*. McMillan v. Escambia County, Fla., 559 F.Supp. 720, 724 (N.D. Fla. 1983) (Memorandum Decision), *appeal docketed*, No. 83-3275 (11th Cir. Apr. 27, 1983), *petition for cert. before judgment filed*, 52 U.S.L.W. 3005 (U.S. July 1, 1983) (No. 82-2155). Nevertheless, the court held that the "law of the case" doctrine required it to carry out the Fifth Circuit's mandate because none of the exceptions to that doctrine was applicable. *Id.* at 725, 730. Accordingly, the court issued an Order, McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Mar. 11, 1983), *appeal docketed*, No. 83-3275 (11th Cir. Apr. 27, 1983), *petition for cert. before judgment filed*, 52 U.S.L.W. 3005 (U.S. July 1, 1983) (No. 82-2155), implementing its interpretation of the Fifth Circuit's decision in *McMillan III*.

Because the court previously had recognized that Justice Powell's analysis was controlling, the court, prior to rendering its decision, had advised the County Commission to adopt for possible consideration as a "legislative plan" a remedial election system and reapportionment plan. In addition to holding that the "law of the case" doctrine precluded it from considering the remedy the County Commission adopted on remand, the court also determined that, if that doctrine

sanction such an unwarranted intrusion on, and usurpation of, legislative powers.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit in *McMillan III* should be reversed.

Respectfully submitted,

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were not a bar, the court would not have implemented the County Commission's remedy because it did not guarantee blacks the opportunity to elect representatives in proportion to their percentage of the population. McMillan v. Escambia County, Fla., 559 F. Supp. at 725, 729, 730. Appellants strongly disagree with the actions taken by the district court on remand and with the reasons underlying those actions. In the interest of resolving all aspects of this case at one time, appellants herein have sought immediate and direct review in this Court of the Order and accompanying opinion the district court issued on remand. Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eleventh Circuit, Escambia County, Fla. v. McMillan, No. 82-2155 (U.S. filed July 1, 1983).